

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE,
SIERRA CLUB, and PEG PINARD,
Petitioners,

v.

No. 03-74628

UNITED STATES NUCLEAR REGULATORY
COMMISSION and the UNITED STATES
OF AMERICA,
Respondents

PACIFIC GAS & ELECTRIC CO.
Intervenor-Respondent

**PETITIONERS' REPLY TO FEDERAL RESPONDENTS'
OPPOSITION TO PETITIONERS' MOTION FOR
LEAVE TO FILE VOLUME OF EXHIBITS**

As permitted by F.R.A.P. 27(a)(4), Petitioners, San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard, hereby reply to the response by the Federal Respondents, the U.S. Nuclear Regulatory Commission and the United States of America (hereinafter "NRC" or Commission"), to Petitioners' Motion for Leave to File Volume of Exhibits (March 15, 2004) (hereinafter "Petitioners' Motion"). *See* Federal Respondents' Opposition to Petitioners' Motion for Leave to File Volume of Exhibits (March 26, 2004) (hereinafter "NRC Opposition").

The NRC does not oppose Petitioners' Motion to the extent that it cites or relies on officially reported Commission decisions or other NRC records that the

Court may consider under the principle of judicial notice. NRC Opposition at 2. Thus, although the NRC does not specifically identify the documents that it considers to fall within this category, it appears that the NRC does not object to Petitioners' reliance on the majority of the documents contained in Petitioners' volume of Exhibits, *i.e.*, the documents cited in the first three sections of Petitioners' Index of Exhibits: the *Private Fuel Storage* Decision, Relevant NRC Guidance Documents, and Relevant NRC Enforcement Orders. *See* Exhibits at i-ii. Moreover, it does not appear that the NRC objects to Petitioners' reliance on an official NRC document included in the Miscellaneous section of the Exhibits, "NRC Regulatory Issue Summary 2002-12A, Power Reactors, NRC Threat Advisory and Protective Measures (August 19, 2002)."

The NRC apparently objects to Petitioners' reliance on seven documents cited in the Miscellaneous section of the Index of Exhibits, on the ground that they may not be considered because they were not part of the administrative record before the agency. NRC Opposition at 1-2, citing F.R.A.P.16(a); *James Madison Limited v. Ludwig*, 82 F.3d 1085, 1095-96 (D.C. Cir. 1996); *Center for Auto Safety v. Federal Highway Administration*, 956 F.2d 309, 314 (D.C. Cir. 1992), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The disputed documents consist of (a) excerpts from four Environmental Impact Statements ("EISs") prepared by the U.S. Department of Energy ("DOE"); (b) an excerpt of

the Environmental Report submitted by Pacific Gas & Electric Company (“PG&E”) as part of its the license application in the proceeding below; (c) a Homeland Security Presidential Directive of March 11, 2002; and the text of a June 17, 2003, speech by the chairman of the NRC.

As stated in Petitioners’ Motion, Petitioners rely on these documents to demonstrate that the NRC’s decision in the proceeding below is contradicted by the NRC’s own regulatory actions and guidance, and is also inconsistent with actions taken by the DOE.¹ Petitioners’ Motion at 1-2. Thus, they fall under an exception to the judicial prohibition against use of extra-record documents.

American Petroleum Institute v. Environmental Protection Agency, 540 F.2d 1023, 1034 (D.C. Cir. 1976) (holding that data generated after the promulgation of a rule

¹ For instance, the four EIS excerpts included by Petitioners in their volume of Exhibits, which reflect consideration of sensitive or classified security-related information, demonstrate the lack of any basis for the NRC’s claim that the National Environmental Policy Act (“NEPA”) is not an “appropriate forum for considering sensitive security issues.” *See* Petitioners’ Brief at 49-50. Similarly, the Homeland Security Presidential Directive and the speech by NRC Chairman Diaz show that the NRC considers the threat of terrorist attacks to be constant and inevitable, and thus undermine the NRC’s claim that such attacks are too far removed from the “expected” consequences of agency action to require a study under NEPA. *See* Petitioners’ Brief at 11, 43. Finally, the portion of PG&E’s Environmental Report cited by Petitioners, which discusses accidents caused by external events such as earthquakes, demonstrates the fallacy of the NRC’s claim that environmental impacts need not be considered if they do not constitute the “natural” consequences of operating a nuclear facility. *See* Petitioners’ Brief at 43-44.

could be examined in order to “show the validity” of the rule).² *See also Amoco Oil v. Environmental Protection Agency*, 501 F.2d 722, 729 note 10 (D.C. Cir. 1974) (holding that extra-record documents could be reviewed in order to evaluate “the truth or falsity of agency predictions”).

Moreover, as discussed in Petitioners’ Brief at 35-38, the Commission’s decision rests on a number of factual determinations for which the Commission developed no evidentiary record whatsoever. In fact, that is Petitioners’ central complaint on this appeal. Petitioners cite the exhibits for the purpose of demonstrating that, in addition to violating the hearing requirements of the Atomic Energy Act and the notice-and-comment requirements of the Administrative Procedure Act, the Commission’s decision is utterly irrational. Petitioners were never permitted to develop an evidentiary record in support of their position. Therefore, in order to illustrate the irrationality of the Commission’s decision, Petitioners had no choice but to cite extra-record documents.

² *American Petroleum Institute* was cited with approval by the 9th Circuit in *Association of Pacific Fisheries v. Environmental Protection Agency*, 615 F.2d 794, 812 (9th Cir. 1980) (observing that a party challenging a regulation may rely upon extra-record documents showing that “the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support”).

Accordingly, Petitioners' Motion should be granted, and the Court should consider their exhibits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Diane Curran". The signature is fluid and cursive, with a large initial "D" and a long horizontal stroke extending to the right.

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April 7, 2004

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CERTIFICATE OF SERVICE

I certify that on April 7, copies of the foregoing Petitioners' Reply to Federal Respondents' Opposition to Petitioners' Motion for Leave to File Volume of Exhibits were served on the following by Federal Express:

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